Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

NO. 75-1415

CHARLES ELLINGTON McGUIRE,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Petition of Charles Ellington McGuire

JIMMY PHILLIPS, JR.
Attorney for Petitioner
P.O. Drawer JJ
Angleton, Texas 77515

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Petition of Charles Ellington McGuire

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

CHARLES ELLINGTON McGUIRE, the Petitioner herein prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit in Appellate Cause No. 75-3223 entered January 21, 1976 and Motion For Rehearing denied March 9, 1976.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is unreported and is printed in Appendix A attached hereto, infra, page 23. The denial of Motion For Rehearing filed by the Petitioner is printed in Appendix A attached hereto, infra page 24. The Judgment and Sentence of the United States District Court for the Southern District of Texas, Brownsville Division, is printed in Appendix A attached hereto, infra page 25.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered on January 21, 1976. A timely Petition For Rehearing was denied on March 9, 1976. The jurisdiction of the Supreme Court is involved under 28 USCS, Section 1254(1).

QUESTIONS PRESENTED

A. Whether the search and arrest of the Petitioner was illegal and without probable cause or reasonable suspicion and the determination of which standard should be applied;

B. Whether the Trial Judge exceeded his authority in sentencing the Defendant when he considered in assessing and determining the sentence the following:

(1) A conviction of the Defendant which was void under the standards of the United States Constitution.

(2) A presentence report (to which the Defendant had no access prior to sentencing) which contained unsubstantiated and erroneous conclusions.

(3) The arrest, search, recovery of evidence, and the filing of a criminal charge, all of which were invalid because they were the result of an illegal search and arrest at a checkpoint removed from the United States border, said arrest and search being made without probable cause in violation of the rights guaranteed under the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

4th, 5th, and 6th Amendments to the United States Constitution, to-wit:

ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. Federal Rule of Criminal Procedure, Rule 32(c), to-wit:

(c) Presentence Investigation.

(1) When Made. The probation service of the court shall make a presentence investigation and report to the Court before the imposition of sentence or the granting of probation unless, with the permission of the Court, the Defendant waives a presentence investigation and report, or the Court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the Court explains this finding on the record. The report shall not be submitted to the Court or its contents disclosed to anyone unless the Defendant has pleaded guilty or nolo contendere or has been found guilty, except that a Judge may, with the written consent of the Defendant, inspect a presentence report at any time.

(2) Report. The Report of the presentence investigation shall contain any prior criminal record of the Defendant and such information about his characteristics, his financial condition and the

circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the Defendant, and such other information as may be required by the Court.

(3) Disclosure.

(a) Before imposing sentence the Court shall upon request permit the Defendant, or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendations as to sentence, but not to the extent that in the opinion of the Court their report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the Defendant or other persons; and the Court shall afford the Defendant or his counsel an opportunity to comment thereon and, at the discretion of the Court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report.

(b) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(a) of this rule, the Court in lieu of making the report of part thereof available shall state orally or in writing a sum-

mary of the factual information contained therein to be relied on in determining sentence, and shall give the Defendant or his counsel an opportunity to comment thereon. The Statement may be made to the parties in camera.

(c) Any material disclosed to the Defendant or his counsel shall also be disclosed to the Attorney for the Government.

(d) Any copies of the presentence investigation report made available to the Defendant or his counsel and the Attorney for the Government shall be returned to the probation officer immediately following the imposition of sentence or the granting of probation, unless the Court in its discretion otherwise directs.

(e) The reports of studies and recommendations contained therein made by the Director of the Bureau of Prisons or the Youth Correction Division of the Board of Parole pursuant to 18 U.S.C. Sections 4208(b), 4252, 5010(e), or 5034 shall be considered a presentence investigation within the meaning of subdivision (c)(3) of this rule.

STATEMENT OF THE CASE

QUESTION "A" (Restated)

A. Whether the search and arrest of the Petitioner was illegal and without probable cause or reasonable suspicion and the determination of which standard should be applied;

STATEMENT UNDER QUESTION "A"

On May 2, 1975, the Defendant, Charles E. McGuire, was arrested; he was a passenger in a vehicle being driven by William W. Head; eight hundred thirty-four (834) pounds of marijuana was found in the vehicle; the Defendant was charged with conspiracy, possession of marijuana, and illegal possession of a weapon; the Defendant filed a Motion To Suppress; at the Motion to Suppress the following occurred:

> Agent George Murray testified that on May 2, 1975 he received a call from an informant. (Vol. II-P. 15). He said that they were going to cross the load in Los Ebonos at the same place that Tony had worked before. (Vol. II-P. 23). Officer Ayala without talking to the informant set up surveillance where he wanted, on his own decision. There were no street numbers or house numbers; the same informant had on April 25th given information concerning a Los Ebonos crossing that proved false. (Vol. II-P. 21-22). Agent Haracio Ayala testified that on April 25 he received information that there was to be marijuana at the pink house but that information proved to be inaccurate. (Vol. II-P. 55-56). That on May 2 he set up surveillance at the pink house. (Vol. II-P. 51). That to his knowledge the house had never before been used for the transportation or importation of contraband. (Vol. II-P. 62). He only assumed that the people he heard were bringing in marijuana. (Vol. II-P. 71). He heard no conversation concerning contraband or money. (Vol. II-P. 60). He heard the talking at the frame house. At the pink house all he heard was thumping. (Vol. II-

P. 77). On May 2 the informant did not give any description of any specific house or place in Los Ebonos. (Vol. II-P. 93).

The Motion to Suppress was overruled and denied; the Defendant then waived a jury; the Government dismissed the conspiracy and possession of weapon counts against the Defendant; trial to the Court proceeded on a plea of Not Guilty;

The Defendant agreed that the officers would testify the same at the trial; he again objected to the introduction of the evidence recovered as a result of the illegal search and seizure. The objection was overruled. After the evidence was presented, the Court found the Defendant guilty.

> Clearly Agent George Murray had insufficient evidence for probable cause for the stopping of the pickup truck in which the Defendant McGuire was a passenger. However, it is now well settled that where an officer makes an arrest at the request of fellow officers, he is entitled to rely on the information gathered by them and their observation in establishing probable cause. *Miller v. U.S.*, 356 F.2d 63, (5th Cir. 1966); *Whitney v. Warden, Wyoming State Penitentiary*, 91 S. Ct. 1031 (1971).

The question, therefore, is whether or not Agent Ayala possessed sufficient observations to give him probable cause to detain and search the vehicle in which the Defendant McGuire was a passenger. There was no smell of marijuana; there was no information that marijuana would be in sacks; that it would be heavy; that it would be loaded in a truck; or that it would arrive at *the* pink

house which was under surveillance and be loaded there; the only facts used to give rise to probable cause for the Defendant's arrest are:

(1) A tip from the informer concerned who had previously given erroneous information.

(2) A truck without lights going into the pink house's yard.

(3) A tailgate lowered and thumping sounds.

The facts are, therefore, insufficient to warrant a finding of probable cause.

In regard to the assertion that the officer need only possess sufficient information to give rise to a reasonable suspicion that the vehicle has been involved with a border crossing, your petitioner would point out that the place in questions had never been used before for the importation or transportation of contraband; that there is brush around the back yard of the house (Vol. II-P. 53) and heavy foliage (Vol. II-P. 86); the bank behind the house is a steep bank (Vol. II-P. 87); there is no showing that the truck in which the defendant was a passenger had any contact with the border itself. The *facts* observed do not raise a reasonable suspicion that the truck in which the Defendant McGuire was a passenger contained contraband.

QUESTION "B" (Restated)

B. Whether the Trial Judge exceeded his authority in sentencing the Defendant when he considered in assessing and determining the sentence the following:

(1) A conviction of the Defendant which was void under the standards of the United States Constitution.

(2) A presentence report (to which the Defendant had no access prior to sentencing) which contained unsubstantiated and erroneous conclusions.

(3) The arrest, search, recovery of evidence, and the filing of a criminal charge, all of which were invalid because they were the result of an illegal search and arrest at a checkpoint removed from the United States border, said arrest and search being made without probable cause in violation of the rights guaranteed under the United States Constitution.

STATEMENT UNDER QUESTION "B"

During the original sentencing hearing the Court commented on the Defendant's conviction in Kentucky and the Defendant's arrest at the Falfurrias checkpoint.

"The Court: He was convicted on May 24th, year before or year before that, down here, on possession of a controlled substance. He was fined $500. Then on April 24th, he was found in possession of 250 pounds of marijuana — no, it's Falfurrias."

Vol. II-P. 118, 1. 21-25

"He has one prior conviction for possession of marijuana for which he paid a $500 fine. It's noted that he denied a prior arrest record to probation officers involved in the investigation, but it has been determined that he has a pending federal case in Corpus Christi, Texas, charging him with possession with intent to distribute approximately 250 pounds of marijuana."

Vol. II-P. 125, 1. 25; P. 126, 1. 6

". . . . . that this defendant, your defendant, Mr. Head, related to the probation officer that he had driven to Texas to meet Charles E. McGuire. He recalls that they were in a bar when an unknown man approached them and offered them a Thousand Dollars to pick up a load and drive about six miles to have it delivered. They were given 500 in advance and followed the stranger to the pick up location. He related that he knew the merchandise was marijuana and that he was violating the law. He rationalized that the stranger made it seem very easy and that no risks were involved. He regarded his involvement as a chance to make some extra money and return to his trucking business which was having a slow season and financial pressures were piling up. The defendant now realizes that the money was not worth the risk of losing his freedom.

If they think I'm going to believe that cock and bull story they are sadly mistaken because he was with another young man here, this fellow McGuire, see, who has a charge pending against him right now, see. In April, I think, he was stopped at the checkpoint in Sarita and charged with being in possession of — 4-24-75 you were stopped — and he was found in possession of 250 pounds of marijuana. Just a month before this thing happened here. That's not even a month, I don't think. This thing happened on May 2nd of 1975, and on April 24th, just eight days before, this young man McGuire was stopped at the checkpoint in Sarita with 250 pounds.

Think I'm going to believe that this was a chance deal? Must be crazy to think that I'm going to swallow that story. I refuse to swallow it."

Vol. II-P. 109, 1. 4; P. 110, 1. 8

"The Court: You weren't no stranger to it because just eight days before they had caught you with

some over there at the checkpoint. So you have been around it."

Vol. II-P. 120, 1. 15-18

In order to demonstrate the error in the use by the Court of the prior conviction and the prior arrest a motion for supplemental hearing was requested and granted; at the hearing the Court made clear its reasons for it giving the Defendant McGuire probation;

". . . . . the important thing to me in sentencing somebody is that he came down here, you know, and they were armed when they were caught with this big load of marijuana here by the river, and just prior to that he had been caught at the checkpoint by the border patrol over here with another load of marijuana. See, those are the things that I pay attention to."

Vol. III-P. 21, 1. 2-9

". . . this had been his first caper, I might not have sent him to the penitentiary, but he had already been caught at the checkpoint with marijuana. This record shows that he had been at least charged with possession of a controlled substance in Kentucky, which he was, you know. No question about his being caught.

The Witness: No sir.

The Court: As to whether disposition was $500.00 fine for pleading guilty or something, that's something else. But the question is, as far as I'm concerned, he was caught in Kentucky with a controlled substance. He was caught here at the checkpoint with a controlled substance, marijuana, and he was caught in the case that I had to sentence him in. That's

the third time that this boy had been charged with these offenses. Whether he's guilty or not guilty of the other two, I don't know, but I know he has been charged with those, you understand."

Vol. III-P. 34, 1. 20; P. 35, 1. 15

"Mr. Phillips: My intention is to show that the arrest was illegal and unconstitutional, and that since —

The Court: I'm not trying this man for that, Mr. Phillips.

Mr. Phillips: No, Your Honor, but you have considered it in assessing his punishment.

The Court: I have considered that he was caught in possession of drugs. That's what I have considered."

Vol. III-P. 49, 1. 11-20

"I never took into consideration that he had been convicted. I took into consideration that he had been arrested in possession of marijuana.

Mr. Phillips: And that he had it in his possession.

The Court: Yes, I sure did."

Vol. III-P. 50, 1. 9-15

William C. McGuire testified that his son was arrested in Kentucky for not having a proper fuel permit (a traffic offense); that at the jail the officers found some pills on him. (Vol. III-P. 10) He hired a lawyer to handle the matter. The lawyer pled the Defendant Charles McGuire guilty without authorization or knowledge of the Defend-

ant or his father. (Vol. III-P. 23) In fact his son never knew anything about the matter. (Vol. II-P. 24)

Charles McGuire testified when he was arrested in Kentucky the police found three Benzedrine pills. (Vol. III-P. 38) He was never admonished of his rights by any court; never hired an attorney nor knew that his father did; and in fact thought that the case was dismissed. (Vol. III-P. 37-38)

Bill Tidball testified that he stopped the Defendant at the Falfurrias checkpoint at 4:00 a.m. in accordance with the procedure where they stopped everyone who they did not know. (Vol. III-P. 54) He had no reason to stop him other than the fact that he did not know who he was. (Vol. III-P. 55) (Vol. III-P. 58)

In order for a guilty plea to be valid, it must be freely, voluntarily, and intelligently entered. Under no circumstances can the facts in this case be said to demonstrate that the plea in Kentucky had been voluntarily and intelligently entered. It is undisputed that Charles McGuire did not know that the charges had resulted in a conviction; to the contrary he thought that the case was dismissed. In *United States v. Tucker,* 92 S. Ct. 589 (1972) it was held to be reversible error and resentencing required where the Court considered an unconstitutionally infirm conviction.

Additionally, the United States Supreme Court held in *Townsend v. Burke,* 68 S. Ct. 1252, (1948) where a prisoner

> ". . . was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand."

There is no doubt but what an assumption concerning the Defendant's criminal record, used in the sentencing procedure was materially untrue; that assumption being that the Defendant had been convicted of possession of marijuana in Frankfort and paid a $500.00 fine;

> "Q. In regards to the conviction in Kentucky, was it a conviction for possession of marijuana?
>
> A. No sir.
>
> The Court: If during the course of this thing I said it was marijuana, I was mistaken. It was possession of a controlled substance. And if for some reason I said marijuana, well, then I was wrong.
>
> Mr. Phillips: The recommendation of the probation officer and was based upon assertions in his report, and one assertion it was for the possession of marijuana. I believe it is on the next to the last page where he summarizes his report and said in his report he has a prior conviction for marijuana for which he paid a Five Hundred Dollar fine.
>
> The Court: Yes, probation officer says that. Possession of marijuana for which he paid a Five Hundred Dollar fine.
>
> Well, I now find it wasn't marijuana, it was pills. Still a controlled substance. Yes. All right."
>
> Vol. III-P. 36, l. 13; P. 37, l. 10

Further if more need be shown, the presentence report which was considered by the Court was inaccurate in many instances but especially concerning the conviction and evaluations of Charles E. McGuire, to-wit:

a. Father's influence to obtain favorable treatment reflected in disposition of 2 cases of reckless driving and a breach of trust.

b. Defendant obtained a chauffeur license before his 18th birthday by manipulating his date of birth.

c. The Defendant had one prior conviction for possession of marijuana for which he paid a $500.00 fine.

d. The Defendant seemed to be completely devoid of any feelings of guilt or remorse.

e. The recommendation that in view of the Defendant's apparent *previous involvement with illegal drugs* (Emphasis Added) and his reluctance toward candor it is doubtful that he would be sufficiently motivated to avoid further conflicts with the law or to successfully complete a period of probation supervision.

In *U. S. v. Weston,* 448 F.2d 626 (9th Cir. 1971) it was held that a sentence had to be vacated and the Court reasoned that a District Court may not rely upon the information contained in a presentence report unless it is amplified by information such as to be persuasive of the charge there made; The presentence report should include no conviction or criminal charge unless referable to an official record. *Baker v. U. S.,* 388 F.2d 931 (4th Cir. 1968).

The Defendant has the *right* not to be sentenced on the basis of invalid premises. Where a sentencing judge explicitly relies on certain information in assessing a sentence, fundamental fairness requires a defendant be given at least some opportunity to rebut that information. *U. S. v. Espinoza,* 481 F.2d 553 (5th Cir. 1973) and where there is shown to be misinformation or a mis-

understanding that is materially untrue regarding a prior criminal record, or a material false assumption as to any facts relevant to sentencing, it renders the entire sentencing procedure invalid as a violation of due process. *U. S. v. Malcolm,* 432 F.2d 809 (2nd Cir. 1970);

It should at this point be noted if not already obvious that the Defendant Charles E. McGuire was never afforded the opportunity to rebut the mistaken and false assumptions PRIOR TO HIS SENTENCE BEING PRONOUNCED by the sentencing judge. The hearing on September 12 was granted solely for the purpose of showing for this appellate record the falsity and misunderstanding on which the judge relied AT THE TIME he pronounced sentence on the Appellant Charles E. McGuire.

The last question concerning the validity of the sentencing of the Defendant is of a two-fold nature. First, was the arrest at the Falfurrias checkpoint invalid and in violation of the Defendant's, Charles McGuire's, rights to such an extent as to render the fruits of the arrest and search subject to the exclusionary rule. It is undisputed that the checkpoint was run almost identical as the checkpoint described in *United States v. Ortiz,* 95 S. Ct. 2585 (1975), in which the United States Supreme Court held:

> "[3] This degree of discretion to search private automobiles is not consistent with the Fourth Amendment. A search, even of an automobile, is a substantial invasion of privacy. To protect that privacy from official arbitrariness, the Court always has regarded probable cause as the minimum requirement for a lawful search. *Almeida-Sanchez,* supra, 413 U. S. at 269-270, 93 S.Ct. at 2537-2538; Chambers

> v. Maroney, 399 U.S. 42, 51, 90 S. Ct. 1975, 1981, 26 L.Ed.2d 419 (1970). We are not persuaded that the differences between roving patrols and traffic checkpoints justify dispensing in this case with the safeguards we required in Almeida-Sanchez. We therefore follow that decision and hold that at traffic checkpoints removed from the border and its functional equivalents, officers may not search private vehicles without consent or probable cause."

The Court went on to indicate that the officers might make a temporary stop, as authorized under *United States v. Brigonoi-Ponce,* 95 S. Ct. 2574 (1975), when an officer's observations led him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and *investigate the circumstances that provoke suspicion.* However since the agent who stopped the Defendant had no special reason for doing so (Vol. III-P. 58), the reasoning of the *Ortiz* case, supra, should apply:

> "In this case, however, the officers advanced no special reasons for believing respondent's vehicle contained aliens. The absence of probable cause makes the search invalid."

The fact that the search is invalid and the marijuana recovered subject to the exclusionary rule at the trial of the case is not determinative of the issue; the further question remains as to whether this arrest occasioned by an unlawful search can be used at the punishment hearing and considered and used against the Defendant at his punishment hearing on another charge. It has long been the rule the trial judge has broad discretion at the sentencing hearing and may consider many factors and even hearsay without the Defendant having prior knowledge as to the hearsay considered as is done in Brownsville with the pre-sentence reports. (Vol. III-P. 607) The broad discretion of the sentencing judge is not usually subject to review unless the sentence is founded at least in part upon misinformation of constitutional magnitude. *U. S. v. Tucker,* 92 S. Ct. 589 (1972) There is a clear conflict among the circuit courts concerning the use of illegally seized evidence at the sentencing of the Defendant.

a. Where illegally seized evidence is reliable and not gathered to influence the sentencing judge, there is no error in using it in connection with fixing sentence. *U. S. v. Schipani,* 435 F.2d 26 (2nd Cir. 1970); or

b. If the court were free to consider the suppressed evidence for the purpose of sentencing, suppression for the purpose of trial might be worse than useless to the accused ". . . . . Exclusion is also indicated without reference to deterence, for the preservation of judicial integrity, a rationale mentioned in MAPP and emphasized in other cases. This reasoning postulates use by the court of illegally seized evidence would make the court a party to the offense against the Constitution. It is difficult to see how judicial use of such material for sentencing would be any less lawless than the judicial use to obtain a conviction." *Verdugo v. U. S.,* 402 F.2d 599 (9th Cir. 1968)

The *Verdugo* case contains the better reasoning of the two theories and should be adopted by this Court; Since there is no doubt that the Court considered at sentencing that the Defendant McGuire was arrested in April with two hundred fifty (250) pounds of marijuana the exclusionary rule should apply and the Defendant McGuire in this case should be resentenced.

REASONS FOR GRANTING THE WRIT

Reference is here made to the STATEMENT OF THE CASE for the concise facts and appropriate arguments. The Writ of Certiorari should be granted for the following reasons.

(1) To resolve the conflict of law between the United States Court of Appeals, 2nd Circuit and 5th Circuit and the United States Court of Appeals for the 9th Circuit in regards to the use of illegally obtained evidence at the sentencing of the Defendant.

(2) To broaden and resolve the unanswered questions concerning checkpoint cases which were not answered, *United States v. Ortiz,* 95 S.Ct. 2585 and *United States v. Brignoni-Ponce,* 95 S.Ct. 2574.

(3) To make more clear the rights of a convicted Defendant at the sentencing hearing and the type of evidence which can be considered against him.

(4) To protect the Defendant's constitutional rights under the 4th, 5th, and 6th Amendments to the United States Constitution to be free from illegal search and seizure and to due process during his trial.

CONCLUSION

For the foregoing reasons this Petition For A Writ of Certiorari should be granted.

Respectfully submitted,

JIMMY PHILLIPS, JR.
Attorney for Petitioner
Charles Ellington McGuire
P.O. Drawer JJ
Angleton, Texas 77515

6th day of April, 1976

CERTIFICATE OF SERVICE

I, JIMMY PHILLIPS, JR., Attorney for Petitioner, CHARLES ELLINGTON McGUIRE, in the above entitled cause, hereby certify that on the 6th day of April, 1976, I served the attached Petition For Writ of Certiorari by Charles Ellington McGuire, upon Sherman Ross, Esq., 610 Houston Bar Center Bldg., 723 Main Street, Houston, Texas 77002, Attorney for Defendant-Appellant, William Washington Head, Jr., and James R. Gough, Esq., Asst. U. S. Attorney, P.O. Box 61129, Houston, Texas 77061, Attorney for the Respondent, United States of America, by depositing a copy in the United States mails, postpaid, addressed to them at his last known address.

JIMMY PHILLIPS, JR.
Attorney for Petitioner
Charles Ellington McGuire

APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75-3223
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM WASHINGTON HEAD, JR.,
and CHARLES ELLINGTON McGUIRE,
Defendants-Appellants.

Appeals from the United States District Court for the
Southern District of Texas

(January 21, 1976)

BEFORE COLEMAN, AINSWORTH and SIMPSON,
Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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* Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409. Part. I.

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1. See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75-3223

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM WASHINGTON HEAD, JR.,
and CHARLES ELLINGTON McGUIRE,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING

(March 9, 1976)

BEFORE COLEMAN, AINSWORTH and SIMPSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in behalf of Charles Ellington McGuire in the above entitled and numbered cause be and the same is hereby DENIED.

JUDGMENT AND PROBATION/
COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date July 23, 1975, with counsel Jimmy Phillips, Jr., pleading not guilty.

There being a finding of guilty.

Defendant has been convicted as charged of the offense of possessing approximately 834 pounds of marihuana with intent to distribute, in violation of Section 841(a)(1), Title 21, United States Code, as charged in Count 2 of the Indictment.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for treatment and supervision pursuant to Section 5010(b), Title 18, United States Code, until discharged by the Division, as provided in Section 5017(c), Title 18, United States Code, and two (2) years special parole term.

IT IS ADJUDGED that the defendant is a Youth Offender pursuant to Section 5006(e), Title 18, United States Code.

The defendant is hereby allowed to voluntarily surrender to the institution designated by the Bureau of Prisons in accordance to Section 4084, Title 18, United States Code.

On June 13, 1975, prior to the Court trial, Counts 1, 3, and 4 were dismissed on motion of the Government.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General.

/s/ REYNALDO G. GARZA
U.S. District Judge

APPROVED AS TO FORM:

/s/ JOHN PATRICK SMITH, AUSA
John Patrick Smith, AUSA

Date: July 23, 1975

No. 75-1415

Supreme Court, U. S.
FILED
JUL 6 1976

In the Supreme Court of the United States

OCTOBER TERM, 1975

CHARLES ELLINGTON MCGUIRE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The memorandum order of the district court is not reported. The court of appeals affirmed without opinion (Pet. App. A).

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1976. A petition for rehearing was denied on March 9, 1976. The petition for a writ of certiorari was filed on April 7, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was probable cause for petitioner's arrest and the ensuing search of the vehicle in which he was apprehended.

2. Whether in sentencing petitioner the district court improperly relied on a prior unlawful arrest and a prior conviction that was constitutionally infirm.

STATEMENT

Following a non-jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1).[1] He was committed to the custody of the Attorney General for treatment and supervision pursuant to 18 U.S.C. 5010(b) of the Federal Youth Corrections Act, to be followed by two years' special parole. The court of appeals affirmed without opinion (Pet. App. A).

The evidence adduced at the suppression hearing[2] showed that agents of the Drug Enforcement Administration were advised by a confidential informant, who previously had supplied them with reliable information, that a large quantity of marijuana was to be smuggled into the United States on a certain night at a particular location on the Mexican border (Tr. 14-16, 21-23, 34, 38, 51). Government agents established surveillance at the location. They thereafter heard voices and sounds indicating that sacks were being dragged along the ground (Tr. 69); saw a pickup truck enter the area with its lights off; and heard sounds indicating that the tailgate of the truck was lowered and that soft, heavy objects were loaded into the bed of the truck (Tr. 51, 53, 59, 61).

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[1]Co-defendant William Head also was convicted on this charge.

[2]The case was submitted to the court on the evidence adduced at the hearing on the motion to suppress and on a stipulation that a Drug Enforcement Administration chemist would testify that the substance seized was marijuana (Tr. 99-103). "Tr." refers to the hearing on the motion to suppress.

When the truck departed, the agents followed it and thereafter stopped it. As they approached the truck, they observed burlap bags loaded inside it. Petitioner, the passenger, was found in possession of a semiautomatic pistol. Petitioner and co-defendant Head, the driver, thereupon were arrested and advised of their rights. A search of the truck uncovered another pistol in the door pocket on the driver's side. The burlap bags were found to contain more than 800 pounds of marijuana in brick-like packages (Tr. 16-19).

ARGUMENT

1. Contrary to petitioner's contention, his arrest and the subsequent warrantless search of the truck were based upon probable cause to believe that petitioner was engaged in the distribution of marijuana.

The reliable informant's information—that a quantity of marijuana would be smuggled into the United States at a particular time and place—was corroborated by the appearance of the truck, and sounds indicating that heavy sacks were being loaded into it. Prior to arresting petitioner, the agents also saw large burlap bags in plain view in the bed of the truck. "And surely, with every other bit of [the informant's] information being thus personally verified, [the agents] had 'reasonable grounds' to believe that the remaining unverified bit [that petitioner was in possession of marijuana] was likewise true." *Draper* v. *United States*, 358 U.S. 307, 313. Cf. *United States* v. *Harris*, 403 U.S. 573, 581. The arrest therefore was lawful, and the subsequent warrantless search was proper under the automobile search exception to the warrant requirement. *Chambers* v. *Maroney*, 399 U.S. 42; *Carroll* v. *United States*, 267 U.S. 132.

2. Petitioner contends that in determining sentence the district court improperly considered a prior state con-

viction for possession of a controlled substance, in which petitioner's guilty plea allegedly was involuntary. At the hearing on petitioner's "Motion to Supplement the Record on Appeal," however, petitioner advised the district court that he had in fact illegally possessed a controlled substance which formed the basis of his prior conviction (H. 38-39).[3] Accordingly, the sentence was founded not upon misinformation of constitutional magnitude (*United States* v. *Tucker*, 404 U.S. 443, 447), but upon petitioner's admitted past conduct. See *United States* v. *Atkins*, 480 F.2d 1223 (C.A. 9).

Petitioner also contends that in determining sentence the district court improperly considered his prior arrest for transporting marijuana, which petitioner contends was unlawful. There was no finding, however, that the prior arrest was unlawful.[4] In any event, in determining sentence the district court has discretion to consider a prior arrest that reflects past conduct, notwithstanding that the arrest may have been unlawful. *United States* v. *Schipani*, 435 F.2d 26 (C.A. 2), certiorari denied, 401 U.S. 983; *United States* v. *Vandemark*, 522 F.2d 1019

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[3]The trial court sentenced petitioner on July 23, 1975. Petitioner subsequently filed a "Motion to Supplement the Record on Appeal," claiming, *inter alia*, that the pre-sentence report included erroneous information. On September 12, 1975, the court held a hearing on the motion, at which petitioner presented several witnesses. At the conclusion of the hearing, the court declined to change the sentence and fully explained its reasons for the sentence imposed (H. 59-61). "H." refers to the transcript of proceedings of the hearing on September 12.

[4]We have been informed by the Clerk of the District Court for the Southern District of Texas, Corpus Christi Division, that petitioner has been convicted by a jury on a charge arising from this arrest, and that petitioner's motion to suppress the evidence seized, on the ground that the arrest was unlawful, was denied. That conviction is now pending on appeal.

(C.A. 9); *United States* v. *Lee*, C.A. 4, No. 75-1068, decided May 17, 1976.[5]

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JULY 1976.

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[5]There is no suggestion here that the prior arrest was made in bad faith. Petitioner's reliance (Pet. 19) on *Verdugo* v. *United States*, 402 F.2d 599 (C.A. 9), therefore is misplaced, since that holding rested upon an express finding that the police conducted the search in order to enhance the defendant's sentence. *Id.* at 612-613.